

DOCUMENT RESUME

ED 188 706

JC 800 403

AUTHOR Zabetakis, Steve
TITLE Consumerism--Student: Legal Issues and Cases.
PUB DATE May 80
NOTE 36p.: Presented at the University of Texas (Austin, TX, May, 1980)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Admission Criteria: Civil Rights: Civil Rights Legislation: College Admission: *Colleges: *College Students: *Court Litigation: Due Process: Higher Education: *Legal Responsibility: *Student Rights: Torts
IDENTIFIERS *Student Consumerism

ABSTRACT

The facts, issues, and final judgements of 53 court cases are presented in this compilation focusing on the legal aspects of the student consumerism movement. The first 18 cases cited deal with issues related to admissions, such as reverse discrimination, admission fees, residency, fraudulent misrepresentation, employment promise, contractual obligations of schools, and denial of admission on the basis of handicaps, sex, and age. The second group of court cases dealt with due process as related to student dismissal, grade point average, right to counsel at school hearings, school policies, commercial solicitation, program cancellation, student-funded litigation, and student demonstrations. The next 11 cases fell into the area of tort liabilities and negligence: they considered the contributory negligence of students, the duty of schools to warn students of latent hazard, waiver of risk, institutional negligence, campus security, and off-campus activity. The final section of the report focuses on civil rights legislation and litigation, describing the provisions of Title 1983 and citing decisions regarding the liability of school officials, sex and race quotas, conduct off-campus, and limits on discipline. A list of major federal civil rights statutes and executive orders affecting students is appended. (AYC)

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CONSUMERISM - STUDENT
LEGAL ISSUES AND CASES

presented at
University of Texas
at
Austin

Steve Zabetakis
Assistant Professor, Police

Under the direction
of Michael H. B...
Dean of Student Affairs

Hagerstown Junior College
751 Robinwood Drive
Hagerstown, Maryland 21740

(301) 790-2800

U.S. DEPARTMENT OF HEALTH,
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Steve Zabetakis
Associate Professor, Police Services

under the direction of
Dr. Michael H. Parsons
Dean of Instructional Affairs

Hagerstown Junior College
751 Robinwood Drive
Hagerstown, Maryland 21740

(301) 790-2800

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CONTRACTS AND ADMISSIONS

The student consumer movement suggests that the contract approach may be vigorously pursued in the future to challenge academic decisions in all sorts of educational institutions, particularly since other avenues seem closed off. Students are apt to charge that contractual provisions were not followed and/or that institutional action was arbitrary and capricious. So far, most courts have remanded these cases to determine if the student can prove the charges, rather than deciding for the student. Nevertheless, the student does gain a hearing, and this may be of significant importance, particularly at nonpublic institutions.*

* Constitutional Rights and Student Life, West Publication, Page 395.

ADMISSIONS1. Reverse Discrimination

Regents of the University of California v. Bakke, 98 S.Ct. 2733. United States Supreme Court, June 28, 1978.

Facts

The facts of this case are briefed in the *College Student and the Courts* 2d at 3-9, and in the *College Administrator and the Courts* at 6-18. Several facts justify emphasis with particular reference to the opinion of the United States Supreme Court. First, the Supreme Court noted that, although originally the Davis Special Admissions Program was targeted toward "economically" and/or educationally disadvantaged applicants, no formal definition of these terms was brought forward in the Bakke case. The Court also noted that beginning in 1974 the relevant admissions questions inquired of applicants whether they considered themselves to be members of a "minority group". Noting that the "special candidates" were rated among themselves in a fashion similar to "regular applicants", the Court made note of exceptions, particularly that "special candidates" did not have to meet the 2.5 grade point average cut-off applied to regular applicants. Also important to the factual setting of this case, and a point which the court found, emphasized that although disadvantaged whites applied to the "special admissions program" in large numbers (73 white applicants in 1973 and 172 white applicants in 1974), none was offered admission under the "special program". This fact is particularly relevant in light of two considerations: First that the regular admissions program itself had resulted in the admission of some forty-four minority students between 1971 and 1974; and the University argued that, in some years, not all of the seats designated for minority students were filled.

The administrator should consult the briefs of the Bakke decision, noted above, as to the other relevant facts present in the case. As is noted in the prior briefs, Bakke brought suit in the Superior Court of California alleging that the Medical School's Special Admissions Program excluded him from the school on account of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, Article I, Section 21 of the California Constitution and Section 601 of Title VI of the Civil Rights Act of 1964. The University sought a declaration that its Special Admissions Program was lawful, both constitutionally and under Title VI of the Civil Rights Act. (The University's position is extremely relevant in examining the opinion of the court on the question of whether the court should reach the constitutional issue present in the case, i.e., whether the Special Admissions Program is violative of Federal rights under the Equal Protection Clause of the Fourteenth Amendment.) The Superior Court found that the Special Admissions Program implemented a racial quota in the exclusive designation of sixteen places in the class of one hundred as reserved for minority applicants. The Court held that the University *could not take race into account in making admissions decisions* and held the program violative of the Equal Protection Clause of the Federal Constitution, Article I of the California

Constitution and Title VI of the Civil Rights Act. The California Supreme Court, applying the strict scrutiny test to its review of the Special Admissions Program, concluded that, notwithstanding the assumption that the program served a compelling state interest, it was not "the least intrusive means of achieving" that interest.

The Court held that the Equal Protection Clause of the Fourteenth Amendment requires that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race" (553 P.2d. at 1166). After an initial remand to the lower court, the California Supreme Court subsequently directed the trial court to enter judgment ordering Bakke's admission to the medical school on the basis of the University's conceded inability to carry its burden of demonstrating that Bakke would not have been admitted even in the absence of the Special Admissions Program. (This action by the California Supreme Court avoided the possibility of an outcome in Bakke similar to *Defunis v. Odegaard*.) The order directing admission was stayed and the United States Supreme Court granted certiorari.

Issue

Did the Special Admissions Program as constituted and applied, violate Section 601 of Title VI of the Civil Rights Act of 1964?

Answer

A majority of the court did not reach consensus on this question; however, the opinions of Justices Powell and Stevens, representing a majority of the court concurring in the affirmance of the California Supreme Court's judgment holding the Special Admissions Program at David unlawful, support the conclusion that the particular program applied in this case would be violative of Title VI either per se or under Justice Powell's reasoning in that it violates the Equal Protection Clause of the Fourteenth Amendment.

Issue

Did the Special Admissions Program, as constituted, apply a suspect classification--i.e., race or ancestry--justifiable only in appropriate furtherance of a compelling state interest?

Answer

Yes

Issue

Assuming the purposes of the Special Admissions Program to be characterized as a compelling state interest, did the Special Admissions Program constitute a justifiably effective means of serving that interest?

Answer

No

Issue

Is a public college or university or one covered by Title VI, prohibited from any consideration of the race or ancestry of an applicant?

Answer

No

2. Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979).

Denial of Admissions/Hearing Impairment

Where an applicant for admission to a nursing program was denied admission because she had a severe hearing impairment, the United States Supreme Court held that section 504 of the Rehabilitation Act of 1973 does not prohibit professional schools, receiving federal funds, from imposing physical qualifications for admission to clinical training programs conducted by such schools.

3. Steinberg v. Chicago Medical School, 371 N.E.2d 634 (1977).

Application Fee

Illinois Supreme Court ruled that a private university accepting an application fee has a contractual obligation to evaluate the student applicant on the basis of announced criteria. Since in this case the \$15 application fee and its acceptance pursuant to a brochure describing the criteria on which applications would be judged constituted a contract and since the institution apparently evaluated the applications according to the monetary contributions made on behalf of those accepting admission, a legitimate cause of action existed. The question arises, however, how a rejected applicant can discover whether such criteria were in fact applied in situations where there is no advance indication of how decisions are reached. Should students have to resort to court suits or should institutions be required to offer every student who complains a hearing? The burdens the latter approach would impose on institutions such as medical schools which are heavily oversubscribed is obvious.

4. Cannon v. University of Chicago, 99 S.Ct. 1446 (1979).

Denial of Admission/Sex

The United States Supreme Court held that when a female applicant for admission to a private college or university has allegedly been denied

admission solely because of her sex, she may bypass the administrative remedies provided by Title IX of the Education Amendments of 1972 and seek private enforcement of Title IX by filing a lawsuit directly in a federal district court.

5. *Purdie v. University of Utah*, 584 P.2d 831 (Utah 1978).

Denial of Admissions/Age

The Supreme Court of Utah held that the denial of admission to a post-graduate program at the University of Utah, which was based solely on the fact that the applicant was fifty-one years old and the department's preference for younger students, violated the equal protection provisions of both the U.S. and Utah Constitutions.

6. *Webster v. State Board of Regents*, 599 P.2d 816 (Arizona Ct. App. 1979).

Resident Status Change

Where twin sisters, attending Arizona State University, were classified as nonresidents for tuition purposes, but later applied for in-state status, it was held that the University's Appeal Committee on Fee Status had ample evidence to support its decision to reject the request for a change of status to in-state.

7. *Podger v. Indiana University*, 381 N.E.2d 1274 (Indiana Ct. App. 1978).

Nonresident Classification

In a suit by a law student challenging Indiana University's classification of her as a nonresident for tuition purposes; it was held that: (1) the University had the statutory authority to set differential tuition rates for residents and nonresidents; (2) the University rules contained ascertainable standards for classifying students'; (3) the University's twelve-month residency requirement does not constitute a permanent irrebuttable presumption of nonresidency and the student had been afforded due process in the classification process.

8. *Oregon: Community College held liable for false representations made to student regarding course selections* (1979).

Fraudulent Misrepresentation

The Supreme Court of Oregon ruled that representatives of the state community college were not exercising a "discretionary function" when they falsely represented to the student that he would receive advanced training in certain techniques on various machines. Therefore, the defense of governmental immunity was not available to the college.

The court then held the college liable for the false representation made to the student.

Before enrolling, the student contacted representatives of the defendant college and was told that if he enrolled he would be taught advanced welding on a milling machine. The representatives also told the student that a milling machine was on order and would be available for use in instruction. The college catalog also stated the college offered courses teaching these skills.

The Supreme Court based its decision on the fact that the student contends the college's representatives assured him certain material and equipment would be available for use in instruction and that materials were not available and the representatives acted "recklessly" in assuring the student it would be available. The court stated "the allegations alone are sufficient to show the college was not performing a discretionary function."

The court then awarded the student damages on the basis of the amount of wages he lost as a result of enrolling and continuing in college instead of working during that period.

9. Oshkosh Student Association v. Board of Regents, 279 N.W.2d 740 (Wisconsin Ct. App. 1979).

Denial to Appoint Students of Search Committee

Where students at the University of Wisconsin-Oshkosh were denied the opportunity to appoint students directly to the Search Committee, to be composed of six faculty, two students and others, it was held that under Wisconsin statutes, the students had the right to appoint their representatives directly.

10. Joyner v. Albert Merrill School, 411 N.Y.S.2d 988 (Civ. Ct. N.Y.C. 1978).

Employment Promise

Where a 50 year-old man was induced to enroll in a computer programming course was promised a \$10,000 job upon its completion, and was carried along in the class after indicating that he did not understand the work, it was held that the inducement was fraudulent and plaintiff was entitled to damages in the amount of the cost of the course plus punitive damages.

11. Holloway v. University of Montana, 582 P.2d 1265 (Mont. 1978).

Waiver of Requirements

A graduate student, who received a "D" in a course and was denied a degree, brought suit against the University of Montana for a declaratory

judgment entitling him to an MBA degree on the grounds that his advisor had allegedly orally waived the requirement that only grades of "C" or better would count toward fulfilling degree requirements. The Supreme Court of Montana, however, held that the record afforded sufficient evidence to support a finding that no waiver had been granted and the lower court's judgment in favor of the University was affirmed.

12. Behrend v. State, 379 N.E.2d 617 (Ohio Ct. App. 1977).

Contractual Relationship

Where students in the School of Architecture at Ohio University sought damages as a result of the School's loss of accreditation, it was held that the relationship between the students and the University was contractual and an action for damages would lie in the state court of claims based on an individual determination of the loss suffered by each student.

13. Hubbard v. John Tyler Community College, 455 F.Supp. 753 (E.D. Va. 1978).

Grade Requirements

Where a nursing student was not allowed to graduate after she received grades of "D" and "F" in two required courses when the school's written policy called for a minimum grade of "C" in all required courses, it was held that none of plaintiff's due process rights had been violated since she was aware of the requirements and of her failure to obtain grades of "C" or better in the required courses.

14. Janniello v. University of Bridgeport (1977)

Course Content

The University successfully defended itself against charges where a student charged that a course was worthless and the student was entitled to a refund of tuition, costs, lost wages and travel expenses.

The student claimed that the content of a required course failed to fit the course description, no tests were given, no grading of work was done and there was little or no classroom discussion.

15. Tedeschi v. Wagner College, 417 N.Y.S.2d 521 (App. Div. 1979).

Suspension Prior to Hearing

In an action for damages by a part-time student who had been suspended by Wagner College, a private institution, it was held that where student

rebuffed efforts for a conference and her behavior was irrational and disruptive, the suspension, prior to a hearing, was not a breach of contract, and she had no cause of action for damages.

16. Swanson v. Wesley College, Inc., 402 A.2d 401 (Del. Super. Ct. 1979).

Code of Conduct Suspension

Where a student at a private college was charged with violating several sections of the Code of Conduct and was immediately suspended, but failed to appear at a subsequent hearing, it was held that the student's due process claim lacked sufficient state action, and the college had accorded the student the basic procedural fairness required under the contractual relationship.

17. Evergreen State College v. Cleland, 417 F.Supp. 508 (W.D. Wash. 1979).

Veterans Benefits

Since the Veteran's Administration is required, by statute, to accept an institution's definition of "full-time study" for purposes of granting full-time Veteran's Administration educational assistance benefits, the Veterans's Administration was held to be without statutory authority to set minimum weekly class attendance requirements for full-time, college-level courses offered on a quarter or semester hour basis and leading to a standard college degree.

and

- Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978).

Consistent with the congressional definition of full-time study, the Administrator of the Veterans Administration was held to have authority to decide what constitutes a full-time course, independent of a university's determination, for purposes of paying veterans' educational benefits.

DUE PROCESS

[Justice Frankfurter,] Due process of law, as a historic and generative principle, *precludes defining*, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice' (emphasis added).

The United States Supreme Court has never attempted to give a precise and fixed definition of due process.

The Supreme Court has defined due process according to the facts and circumstances of each case, and accordingly, what is due process today may be quite something else on another day.

In general terms, due process can be operationally defined as *law in the regular course of judicial proceedings that is in accordance with natural, inherent, and fundamental principles of justice.**

* The Supreme Court, Cases and Comments, Saunders Co., 1978, Page 95.

DUE PROCESS

1. Aubuchon v. Olsen, 467 F.Supp. 568. United States District Court, Eastern District, Missouri, Eastern Division, 1979.

Terminating Student-Teacher Without Hearing

Issue

Did the facts require that a hearing be given to the Plaintiff?

Answer

No

Reasoning of the Court

The reason for the administrative drop was academic, not disciplinary. The administrative drop was not based on the opinion that there was a need for psychological help. The Dean's decision was based on the items summarized by him, all of which went to the academic performance.

Furthermore, there was no evidence that the note as to psychological help would be revealed to other schools to which Plaintiff might seek admission or would in any way be made part of the explanation of why Plaintiff was administratively dropped from the course.

There was nothing to indicate that the administrative drop would preclude the Plaintiff from obtaining a teaching certificate. He was graduated from the University with a Bachelor of Arts degree.

Even if it were to be assumed that he was entitled to a hearing, which the Court held he was not, the Court concluded that the meeting held in the assistant principal's office was all that due process would require. He had been advised that his behavior of the previous week would be there discussed, and in fact that was the only topic of discussion.

He was given repeated opportunities to present his version of the incidents and to rebut the statements of the cooperating teacher, and he refused to do so. The meeting was attended by his supervisor and by the cooperating teacher. No violation of his constitutional rights took place.

Facts

The Plaintiff student sued the Associate Dean of the School of Education at the University of Missouri-St. Louis and an Instructor of English and Education at that University, as well as the Coordinator of Advisement of Clinical Services in the School of Education and the Curators of the University of Missouri, alleging a violation of his rights to due process of law.

The Plaintiff was enrolled as a full-time student in the student teaching program offered by the School of Education at the University. This program required students seeking to obtain teaching certificates to be placed in a secondary school as a student-teacher under the guidance of the cooperating classroom teacher and a supervisor from the University. This was done, and the student's performance during the first half of the semester was satisfactory.

The second half of the semester resulted in some problems. First the Plaintiff was joking and laughing with students when they were supposed to be working on an art project under the supervision of the art teacher. Next he deviated from the lesson plan. He also failed to provide instructions which the cooperating teacher had requested him to do and instead wrote on the blackboard "I have seen the ghost."

All of these matters caused the classroom teacher to ask the Plaintiff not to return the next day, but to set up an appointment with the assistant principal when the three of them would discuss the Plaintiff's student teaching and attempt to reach a resolution.

This meeting was held and also included an Instructor of English and Education at the University whom the student-teacher requested to attend. The meeting did not result in a satisfactory resolution, but instead Plaintiff refused to answer questions in connection with the incidents of the preceding week but responded simply with the question, "What do we share?" and asked for standards by which to be judged and asked for the presence of students.

The assistant principal still wanted to receive the Plaintiff's version of the incidents, but on Plaintiff's refusal to provide any answers the meeting ended with advice to the Plaintiff that he could not return to the high school until he met with officials at the University and had a further conference with the assistant principal.

After the meeting, the Instructor of English and Education who had attended at Plaintiff's request wrote a note to the Dean of the School of Education advising him that the bizarre behavior in the classroom resulted in the meeting and that the Plaintiff's behavior in the meeting was so strange that she believed perhaps some emotional illness was involved. This note was placed in the student's file, but the record failed to indicate that the contents of the note had been or ever would be revealed.

The Dean had a subsequent meeting and after being advised of the details summarized the deficiencies of the Plaintiff as follows: difficulty in hearing and accepting criticism; difficulty in focusing on day-to-day matters of students' learning and details of teaching, preferring instead to philosophize; failure to follow written lesson plans; frequent straying from assigned topics; failure to detect and correct grammatical errors; tendency to over-identify with students; failure to answer direct questions and enter into a dialogue about his progress and problems.

The Dean requested that the Plaintiff voluntarily withdraw from the student teaching course and advised him that if he failed to do so, an administrative drop would be recorded.

The Plaintiff's father then contacted the Dean, and the Dean advised him that the English instructor felt that Plaintiff had psychological problems.

The law suit was brought alleging a violation of due process and alleging that the note of the English instructor to the Dean was a stigma imposed upon the Plaintiff.

2. Romanelli v. Boyer, 48 L.W. 2245. United States District Court, Connecticut, 1979.

Withholding Transcripts Without Due Process

Issue

Is there a legally recognizable property interest in college transcripts which would give rise to the necessity to apply the due process clause?

Answer

No

Reasoning of the Court

Simply because the university offers former students the service of providing them with transcripts of their record of achievement does not convert the transcripts into the property of the students. Mere subjective expectancy of receiving a benefit is not protected by procedural due process.

Facts

A former student challenged a ruling that the university's refusal to release transcripts of grades to former students who had not repaid their National Defense or direct students' loans did not constitute a taking of "security".

The National Student Loan Act provides that loans are to be made without security and without endorsement. The student challenged the interpretation of the word *security* and argued that she was deprived of property without due process of law, since she was not given notice or an opportunity to be heard prior to the decision to withhold her transcript.

3. Miller v. Hamline University School of Law, 601 F.2d 970. United States Court of Appeals, Eighth Circuit, 1979.

Due Process in Dismissal

Issue

Are students entitled to a formal hearing prior to dismissal for academic reasons?

Answer

No

Reasoning of the Court

The right to a hearing prior to academic dismissal was recently rejected by the Supreme Court of the United States in *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). Miller was informed of his grade deficiency and impending dismissal, his dismissal was for academic failure, and he was allowed to present and support in writing his request for readmission and in fact was given the opportunity to privately contact Admission Committee members. He was not denied due process.

4. *Watson v. University of South Alabama College of Medicine*, 463 F. Supp. 720 (S.D. Ala. 1979).

Dismissed for Academic Deficiencies

Where a medical student at the University of South Alabama College of Medicine, who was dismissed for academic deficiencies, alleged that the average of all his course grades was above the passing point for single-course grades, as stated in the college bulletin, the federal district court ruled that the bulletin speaks only to single-course grades and does not stand as a measure by which the average of all such grades is to be compared. The court also held that the student had not been discriminated against because of his race and that none of his due process rights had been violated.

5. *Johnson v. Sullivan*, 571 P.2d 798, Montana State Supreme Ct.

Computing Grade Point Average

Montana Law School system of computing cumulative grade point averages which takes into account a failing grade even if a student later passes the course does not violate students due process.

6. *Miller v. Hamline University School of Law*, 601 F.2d 970 (8th Cir. 1979).

Expelled for Failure to Achieve Passing Grades

Where a student at Hamline University School of Law, who was expelled for failure to achieve passing grades, claimed that his constitutional

rights of due process were denied by the university's refusal to allow him to appear before the admissions committee, the federal court of appeals held that none of the student's due process rights had been violated since he was informed of his grade deficiency and impending dismissal; he was allowed to present, and support in writing, his request for readmission; and he was given the opportunity privately to contact the admissions committee members.

7. *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978).

Right to Counsel at Campus Hearing

In the case of a University of Rhode Island student who was charged with violent assault with intent to rape in both criminal court and on-campus proceedings, the federal court of appeals held that the student did have the right to employ legal counsel to advise him at the campus hearing.

8. *Cummings v. Virginia School of Cosmetology, Inc.*, 466 F. Supp. 780 (E.D. Va. 1979).

School Policies Violates Students Rights

Two former students at a private cosmetology school brought action against the school claiming that various policies of the school, including the requirement that students do hairdressing work for tuition credit, violated their constitutional rights. It was held that the school was not engaged in "state action" and that none of the plaintiffs' rights had been violated.

9. *American Future Systems, Inc. v. The Pennsylvania State University*, 464 F. Supp. 1252 (M.D. Pa. 1979).

Policy Prohibiting Commercial Solicitation

A Pennsylvania State University policy prohibiting commercial solicitation in the residence halls was held not to be an infringement of first amendment rights when such solicitation is designed to sell merchandise to students.

10. *Aubuchon v. Olsen*, 467 F. Supp. 568 (E.D. Mo. 1979).

Stigma Imposed

Where a student was dropped from a student-teaching course by an associate dean and the student claimed that he was denied due process since a stigma was imposed upon him by a note written to the associate dean by his instructor containing the opinion that the student was in need of psychological help, the federal district court found no

evidence that the note was the basis of the administrative decision to drop the student from the course, and the court held that none of the student's due process rights had been violated.

11. Peretti v. State of Montana, 464 F. Supp. 784 (D. Mont. 1979).

Legislative Cut in Appropriations

In an action by students whose course of study in an aviation technology program at Montana State Vocational Education Center was interrupted due to a legislative cut in appropriations, it was held that the state of Montana was liable to the students under an implied contract between the state and the students under which the students were to be given the opportunity to complete the program within a period of six quarters and receive a diploma.

12. Marypirg v. Elkins, 1977 (University of Maryland).

Student Funded Litigation

Maryland Public Interest Research Group (Marypirg) an S.F.A. organization wanted to use funds appropriated by the student government to pay litigation expenses.

Maryland Court of Appeals found that there was no violation of first amendment rights to petition the government for redress of grievances. That there was compelling state interest to justify an exception to the first amendment. That Marypirg still would be able to litigate but would have to use non-state monies such as gifts and contributions to finance the litigation.

13. Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978).

Demonstration/First Amendment Rights

A Texas Tech University prohibition against Iranian students wearing masks during a campus demonstration against the Shah of Iran was held to violate the student's first amendment rights.

and

Ghafari v. Municipal Court for the City and County of San Francisco, 150 Cal. Rptr. 813 (Ct. App. 1978).

Where demonstrating Iranian students were arrested and charged with violating a statute which prohibits the wearing of masks in public, it was held that the statute was vague, overbroad and a denial of equal protection of the law.

and

Mashi v. Immigration and Naturalization Service, 585 F.2d 1309 (5th Cir. 1978).

Where an alien student at Galveston College was found deportable by an immigrant judge and the Board of Immigration Appeals, the federal court of appeals reversed the decision and held that the student could not be deported based upon the fact that his course load briefly dropped below 12 credits.

and

Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S.D. Tex. 1978).

Where a large number of Iranian students at Bee County College occupied the gymnasium causing the cancellation of several classes and subsequent disciplinary action against the students, the federal district court ruled that the action of the students was not protected by the first amendment and the disciplinary procedures used by the College did not violate due process.

TORT LIABILITIES AND NEGLIGENCE

That body of law which associates itself with redress of wrongful acts/injuries.

The acts/injuries suffered by a consumer-student either emotionally or physically by another person or institution.

These include negligence and/or misrepresentation. The remedies are discretionary decisions of the courts derived from the facts and circumstances of each situation.

TORT LIABILITIES AND NEGLIGENCE

1. Danos v. Foret, 354 So.2d 667, Court of Appeal of Louisiana, First Circuit, 1977.

Contributory Negligence of Student in Welding Course

Facts

Danos, a student at the South Louisiana State Trade School, approached his instructor in a welding course to ask about a weld. The instructor was cutting the top off a freon cylinder, so Danos stood nearby waiting for the instructor to complete the job. The cylinder exploded, injuring Danos. The trial court entered a judgment for Danos in an amount in excess of \$33,000. The State appealed, arguing that the student was contributorily negligent because, with full knowledge of the danger, he chose to stand in the area closely proximate to the lathe on which his instructor was cutting the freon cylinder, which area was marked "danger."

Issue

Was the student negligent in standing near his instructor, while waiting to ask his question, where the instructor observed him?

Answer

No

Reasoning of the Court

The instructor observed the student and there was no credible evidence in the record supporting the finding that the student knowingly placed himself in a position of danger.

and

Dizick v. Umpqua Community College, 599 P.2d 444 (Or. 1979).

The Supreme Court of Oregon has held that statements by representatives of Umpqua Community College and those appearing in the catalogue which described courses to be taught and available equipment, did not constitute the exercise of a discretionary function so as to permit the College to claim governmental immunity as a defense against a tort action brought by a student, who alleged fraudulent representation, when the courses were not taught and the equipment was not available. The supreme court reversed the decision of the lower court and remanded the case with instructions to reinstate the judgment for the plaintiff. The jury, at the trial level, had awarded the student \$125,000.

and

State ex rel. Douglas v. Ledwith, 281 N.W.2d 729 (Neb. 1979).

Enjoinment

The Supreme Court of Nebraska affirmed a lower court order permanently enjoining a modeling school from advertising in the "Help Wanted" column, or in any other way that would lead individuals to believe that the advertisements were for paid employment. The school was also enjoined from making any representations that students would receive paid employment during their training or upon graduation, but it was permitted to provide students with lists of available positions and the names of others who had obtained employment. The school was also enjoined from representing a "models card" as necessary to obtain employment, and from expelling any student without just cause with payment of a pro rated tuition refund.

2. Brungard v. Hartman, 394 A.2d. 1265. Supreme Court of Pennsylvania, 1978.

Defense of Immunity in Tort Action

Facts

Karen Brungard sued the Mansfield State College and John Hartman, a chemistry professor at the college, for negligence, alleging that she was injured in an explosion in a chemistry laboratory. The lower court dismissed the action against the state college, based on sovereign immunity, and dismissed the action against the chemistry professor, based on official immunity.

Issue

Are sovereign immunity and official immunity viable defenses in Pennsylvania?

Answer

No

Reasoning of the Court

Sovereign immunity has been abrogated in Pennsylvania by a previous Pennsylvania Supreme Court Decision. As to official immunity, the liability of state officials should not be analyzed solely on the basis of their status as employees of the Commonwealth. Rather, an examination is required to see whether the considerations underlying official immunity are effectively advanced.

3. Rice v. Florida Power & Light Company, 363 So.2d. 834 Florida District Court of Appeals, Third District, 1978.

Duty to Warn, Latent Hazard

Facts

The plaintiff is the widow of Brian Rice, who was a twenty-eight year old geology student at the University of Miami who was electrocuted in an accident. He and a friend, another student, had decided to fly a model airplane over an open field owned and maintained by the University of Miami. The field was frequently used as a general recreation area. The field had large open spaces away from power lines, but the two men took the plane to a place in the field just north of the uninsulated power lines which traversed the field over-head. The plane was activated by ground controls by two fifty-foot metal wires which ran from a control handle to one wing. Rice worked the controls; the plane took off and flew less than a half circle before hitting the power line. Rice dropped to the ground and died.

The day was a clear, sunny day, and while neither noticed the overhead power lines, the wires were clearly visible once one looked up at them. The control handle bore information "danger of electrocution; do not fly model airplane near electrical power lines." Brian Rice knew the potential dangers of electricity, was an A student, and had worked part time flying into hurricanes to record meteorological data.

Issue

Is the university, owner of the land, entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own sense, and is not required to give the invitee notice or warning of an obvious danger?

Answer

Yes

Reasoning of the Court

The existence of unobstructed power lines, clearly visible above an open field, is not a latent hazard.

4. Doyle v. College, 403 A.2d 1206 (Me. 1979).

Waiver of Risks

The Supreme Judicial Court of Maine held that statements signed by a student and his father to assume all risks associated with participation in a floor hockey clinic were not releases of liability for negligence, and the document executed by the student's mother was not an agreement of indemnity.

5. Amon v. State, 414 N.Y.S.2d 68 (App. Div. 1979).

Negligence of Safety Guard

Where a student at SUNY Albany had part of his right index finger severed while using a table saw in the scenery shop, it was held that the state was negligent in its disregard for the use of the safety guard supplied by the manufacturer.

6. McKnight v. St. Francis Hospital and School of Nursing, Inc., 585 P.2d 984 (Kan. 1978).

Negligence, Hospital/Radiology Department

In a malpractice suit arising when a seventy-five year old patient, who complained of being in a weakened state and whose medical form had the history section left blank, fell off the x-ray table sustaining injuries, the Supreme Court of Kansas held that sufficient evidence existed for a finding of negligence on the part of the hospital for failing to advise the radiology department of the patient's weakened state and history.

7. Duarte v. State, 151 Cal. Rptr. 727 (Ct. App. 1979).

Campus Security

On rehearing, in the case of a female student who was raped and murdered in a residence hall owned and operated by a state university, where the university knew of past assaults on students but represented the campus as safe and failed to warn students of foreseeable dangers or institute security devices, it was held that the university owed a duty to students to provide an essentially safe place of residence. It was further held that an allegation of negligent misrepresentation stated a cause of action against the university which was not barred by statutory governmental immunity, the doctrine of sovereign immunity did not prohibit an action based on landlord-tenant contract, and the university had no statutory immunity from liability for negligence of its employees.

8. Shannon v. Washington University, 575 S.W.2d 235 (Mo. Ct. App. 1978).

Duty to Maintain Property

Where a student at Washington University slipped and fell on an icy walkway on the campus and was awarded a jury verdict of \$10,000, it was held that the issues of the University's breach of duty to maintain property in reasonably safe condition and contributory negligence on the part of student were proper matters to be decided by the jury and judgment was affirmed.

9. Delaware Valley College

Off Campus Activity

A Delaware Valley College student was seriously injured in an automobile accident after he and the driver had attended an off-campus sophomore

class picnic where draft beer was served. The College was held liable for negligence in its supervision of the picnic at which beer was served and the injured student was awarded \$1,108,067 in damages against the College and other defendants.

CIVIL RIGHTS ACT (42 U.S.C.A. TITLE 1983)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the U.S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper preceeding for redress."

Purpose of #1983 is to provide a civil action for damage.

1. Action can be brought in to state courts, but most are filed in U.S. District Courts.
2. The act allows for redress of a private and personal wrong.
3. Is referred to as the "Constitutional Tort Statute."

Elements of a cause of action under #1983 include:

1. Conduct engaged in under color of law.
2. That deprived the plaintiff of rights, privileges or immunities secured to him by the federal constitution, or federal statutes.
3. Plaintiff must allege and prove the denial of a federally protected right.
4. Relief under #1983 can include: injunctions, declaratory judgments and monetary damages.
5. A plaintiff who can prove actual damage can recover such damage.

Nominal damages can be recovered without showing actual damage; plaintiff need only show that he was deprived of a right.

Three types of money damage available to redress the denial of constitutional rights:

1. Actual Damage - to compensate for out of pocket expenses and mental suffering.
2. Nominal Damage - to vindicate an individual's rights if no actual damage was sustained.
3. Punitive Damage - to punish wrongful acts done intentionally and maliciously.

Who can sue under #1983?

1. Anyone - does not have to be a citizen.
2. Aliens can use 1983 to vindicate their due process and equal protection. Refer to Robeson v. Fanelli 94F Supp. 62 (1950) "Title 1983 protects all persons within the jurisdiction of the respective states, whether citizens or not."
3. Rights to be protected are principally:
 - a. due process rights.
 - b. equal protection rights.
 - c. privileges and immunities of citizens.
 - d. rights owing their existence to federal functions.
 - e. rights created by federal statutes.

Federal v. State remedies

1. From a procedural standpoint, existence of state remedy does not bar recovery prior to commencement of action in federal court.

2. In *Monroe v. Pape* (1961) "the federal remedy is supplementary to state remedy and the state remedy need not first be sought and refused before the federal is invoked."

Who is the defendant?

1. The person must be shown
 - a. to be a "person" within the meaning of the statute and
 - b. to have been "acting under color of law or acting in concert with one who was acting under color of law at the time of the alleged civil rights deprivation."
2. Term person has generally been held to mean: public servant, employed by a state, territory, or a political subdivision. The political entity itself is not liable because it is not considered a "person" within the meaning of 1983. State and Quasi - state officials are "persons" and are liable, provided the violation occurred as a result of their abuse of power.

Phrase "acting under color of law" means: "carrying out the task or obligations assigned" (*Monroe v. Pape*) and "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." (*Salazar v. Dowd*, 256 F. Supp. 220, 1966).

CIVIL RIGHTS

1. Wood v. Strickland, 420 U.S. 308, (1978).

School Officials Could be Liable

The Supreme Court ruled that in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected.

Such liability holds even if the violation is done without malice but only through ignorance or oversight. Said the Court: "The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with suspension of students' daily lives than by the presence of actual malice.

and an elaboration in

Carey v. Piphus, 435 U.S., 247 (1978).

Supreme Court concluded that students who are suspended from elementary and secondary schools without procedural due process are entitled only to nominal damages (in this case, \$1) unless proof is introduced to show actual injuries justifying larger, compensatory amounts. In *Carey* the students sought \$5,000 in damages for the illegal suspensions. In an important footnote, however, Justice Powell, who wrote the opinion, noted that "this is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of determining or punishing violations of constitutional rights." (At p. 257; fn. 11). The Court also noted that the defendants in 1983 suits face potential liability for attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C.A. 1988. Since attorneys' fees can be strikingly large, this federal law provides, in Justice Powell's words, "additional--and by no means inconsequential--assurance that agents of the State will not deliberately ignore due process rights." (Id.) Thus, while students will experience no windfalls from *Wood*, administrators may suffer substantial monetary penalties for denials of student due process rights even absent proof of actual student injuries.

2. Another 1978 case, *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

Action Under 1983 May Include Government Entities

§ 1983 actions are not limited to "persons" only but may also include government entities as well. By overruling an earlier decision, *Monroe v.*

Pape, 365 U.S. 167 (1961), to the contrary, the Court opened an avenue for plaintiffs to recover damages from the government itself when governmental agents abrogate constitutional rights.

Note

It remains to be seen whether governmental agencies such as school boards can protect themselves from suit through state "sovereign immunity" acts. However, the ruling may be somewhat less significant in the educational setting, for the Supreme Court has assumed jurisdiction of § 1983 cases against school boards in the past, though most of these cases were confined to school desegregation issues and included school board members and school officials as defendants along with the boards themselves.

Whether such litigation will result in judicial inroads in educational decision making is unclear.

The decision of "*Wood*" was a 5-4 decision, with a particularly outspoken dissent written by the generally acknowledged educational expert on the court, Justice Lewis Powell.

3. *Goss v. San Jacinto Junior College*, 588 F.2d 96. United States Court of Appeals, Fifth Circuit, 1979.

Junior College District as a "Person".

Issue

(1) Is an independent junior college board or district a "person", subject to suit under § 1983 of the Civil Rights Act of 1964? (2) Is a community college district immune from suit for damages under § 1983, because of the Eleventh Amendment to the United States Constitution?

Answer

(1) Yes; (2) No

Reasoning of the Court

Relying upon the recent decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), the Court reaffirmed that local government entities and local independent school boards are "persons" for purposes of a federal court's jurisdiction under § 1983. Such persons, the Court held, "are not entitled to an immunity defense when execution of a government's policy, or custom, whether made by its lawmakers or by those whose edicts or acts may thoroughly be said to represent official policy inflicts the injury." In this case, the Court found that the recommendation of the community college president for nonrenewal, affirmed by the board, is the action of a person "whose edicts or

acts may thoroughly be said to represent official policy." The Court rejected any claim of immunity under the Eleventh Amendment, relying upon its prior decision in *Hander v. San Jacinto Junior College*.

Facts

Mrs. Goss was employed by San Jacinto Junior College in 1966 as an untenured history teacher. Her contract was renewed annually for six years. During these six years, Mrs. Goss participated in the formation of a local chapter of the National Faculty Association, an affiliate of the National Education Association. She also campaigned on behalf of her husband, who sought a seat on the San Jacinto Junior College Board of Regents. In 1972, Mrs. Goss was advised in writing by the President of the Community College that the Board of Regents had determined not to renew her contract for the ensuing academic year "because of declining enrollment and poor evaluation of her work." Subsequently, in response to her complaint that the nonrenewal of her teaching contract was in retaliation for her exercise of First Amendment rights, the College reinstated Mrs. Goss in the fall of 1974. Notwithstanding her reinstatement, Mrs. Goss brought this suit under § 1983 of the Civil Rights Act of 1964 and was awarded \$23,400 in compensatory damages for lost employment. The College Appealed.

Note

Although this case is in reference to employees it may establish the concept "person" and "immunity" for students.

4. *Uzzell v. Friday*, 591 F.2d 997 (Fourth Cir. 1979).

Race and Sex Quotas

Two regulations at the University of North Carolina were held to violate equal protection guarantees as well as civil rights laws. One regulation provided that the legislative branch of the student government must include at least two members of a minority race, and if the election process does not produce this result, then the president of the student body shall make appointments to fulfill this requirement. The other regulation provided that in the judicial branch of the student government, an accused, on request, is entitled to have four of the seven judges of his own race or sex.

The acts complained of were (1) the disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group originally composed exclusively of black students whose membership policies were discriminatory; (2) the minority-representation provision of the student constitution requiring that there be at least two blacks, two women, and two men on the eighteen-member legislative branch of student government; (3) the provision in the student government constitution that permits a student accused of violating university rules to be tried by an honor court bench that

includes at least four judges (of seven) who are members of either the student's race or sex, as he or she requests.

The Court ruled that the University's method for obtaining fairness (providing protective representation) instead perpetuated inequality. The court recognized that *Bakke* permits a state educational institution to consider race in fixing the rights of students, but it concluded that *Bakke* prohibits the use of race as the sole determinant in any such adjustment. The court then quoted Justice Powell's opinion in *Bakke*, that "when a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." It then found that the university had failed to demonstrate that the accomplishment of the state's purpose required its use of a suspect classification in the two student government regulations that were challenged. The court thus reversed the trial court's motion to dismiss for the university and directed a summary judgment for the student plaintiffs.

5. *Zimmerman v. Michigan Technological University*, USDC, WD Michigan, No. M 79-4 CA, dated January 29, 1979.

Student Suspension, Acting under Color of Law

The student alleged that the suspension was a result of actions taken by the defendants under color of state law and in violation of liberty and property rights guaranteed to the plaintiff by the Due Process Clause of the Fourteenth Amendment to the Constitution.

The student was suspended for selling marijuana to a high school student. After a long on again, off again hearing, the university suspended the student for six months and he began the proceedings in federal court. At issue were a number of due process and procedural claims which the student failed to prove. The court determined that the student did not show that he would succeed on the merits of the case and found for the university.

6. *Krasnow v. Virginia Polytechnic Institute*, 551 F.2d 591 (Fourth Cir. 1977).

Conduct Off Campus

It is not considered contrary to fundamental fairness to discipline a student for conduct occurring solely off campus, if the rules stipulate that off campus conduct may be grounds for disciplinary action.

The Court ruled, the university clearly has the prerogative to determine that any unlawful possession of drugs or criminal conduct on the part of students is detrimental to the university.

Further that no "irrebuttable presumption" against the student would be set up by such a rule, since the student continues to retain procedural due process rights in a campus hearing held on off-campus conduct.

The school or college can only act on the issue that would be detrimental to the educational institution. The linkage between the off campus and on campus harm must be clear.

7. Escobar v. State University of New York, College at Old Westbury, 427 F.Supp. 850 (1977).

Limits on Discipline

The court ruled where the offending student has been formally charged under the College's disciplinary code, has commenced compliance with that sentence, it is a denial of due process for the chief administrative officer (President) to step in, conduct his own private review of the student's record, and impose a different punishment without complying with any of the procedures which have been formally established for the College.

Major Federal Civil Rights Statutes and
Executive Orders Affecting Students

STATUTES/ EXECUTIVE ORDERS	PURPOSE
Civil Rights Act of 1866 42 U.S.C. Sec. 1981	Prohibits racial discrimination in making and enforcing contracts.
Civil Rights Act of 1871 42 U.S.C. Sec. 1983	Prohibits denial of constitutional and statutory rights by public officials.
Civil Rights Act of 1971 42 U.S.C. Sec. 1985(3)	Prohibits conspiracies by public officials to deprive persons of rights of equality guaranteed by the federal government.
Civil Rights Act of 1964, Title IV 42 U.S.C. Sec. 2000c. As amended in 1972	Prohibits discrimination based on race, color, religion, sex, or national origin in public schools and colleges.
Civil Rights Act of 1964, Title VI 42 U.S.C. Sec. 2000d	Prohibits discrimination on basis of race, color, or national origin in any federally assisted program or activity.
Civil Rights Act of 1964, Title VII 42 U.S.C. Sec 2000e. As amended by the Equal Employment Opportunity Act of 1972	Prohibits discrimination on basis of race, color, national origin, religion, and sex in areas of public and private employment, including education. Establishes the Equal Employment Opportunity Commission (EEOC) to enforce its terms.
Federal Executive Order 11246 of 1965. Amended by Executive Order 11375 of 1967	Prohibits discrimination on basis of race, sex, color, religion, or national origin by federal contractors and requires those with over \$50,000 in federal contracts to file affirmative action plans with HEW.
Education Amendments of 1972, Title IX, 20 U.S.C. Sec. 1681	Prohibits discrimination on the basis of sex against students and employees at educational institutions receiving federal assistance. Exempts single-sex institutions or those with contrary religious beliefs and certain other single-sex organizations, e.g., Boy Scouts.

Major Federal Civil Rights Statutes and
Executive Orders Affecting Students--Continued

STATUTES/
EXECUTIVE ORDERS

PURPOSE

Vietnam Era Veterans' Readjustment
Assistance Act 1972, 38 U.S.C. Sec.
2012. As amended in 1974

Requires government contractors to take
affirmative action in employment of Vietnam
veterans where government contracts involve
\$10,000 or more.

Rehabilitation Act of 1973, 29
U.S.C. Sec. 794 (Sec. 504 of the Re-
habilitation Act of 1973). As
amended in 1974

Prohibits discrimination against persons
with physical, mental, or psychological
disabilities in federally assisted programs
and activities. Also requires affirmative
action to bring the handicapped into the
mainstream of American life.

Equal Educational Opportunities
Act of 1974, 20 U.S.C. Sec. 1701

Amends the Elementary and Secondary
Education Act of 1965 by stating that
all children enrolled in public schools
are entitled to equal educational
opportunity without regard to race,
color, sex, or national origin.

Education for All Handicapped
Children Act of 1975, 20 U.S.C.
Sec. 1401

Requires that all handicapped children
have a free public education designed to
meet their unique needs.

Age Discrimination Act of 1975
42 U.S.C. Sec. 6101

Prohibits unreasonable discrimination
based on age in federally-assisted pro-
grams or activities.

Civil Rights Attorney's Fees
Award Act of 1976, 42 U.S.C. Sec.
1988

Provides that courts may allow prevail-
ing party in equal rights suit reasonable
attorneys fees as part of the cost.*

*Constitutional Rights and Student Life, West Publications, 1979, Page 526.

References

Constitutional Rights and Student Life, Kemerer and Deutsch, West Publications, 1979.

Legal Handbook for Educators, Patricia Hollander, Westview Press, 1978.

The College Administrator and The Courts, College Administration Publications, Inc., various publications.

National Organization on Legal Problems of Education (NOIPE), various publications.

The Supreme Court, Cases and Comments, Lewis and Peoples, Saunders Company, 1978.

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